

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company)	
)	00-0259
Petition for expedited approval of)	
implementation of a market-based)	
alternative tariff, to become effective on)	
or before May 1, 2000, pursuant to)	
Article IX and Section 16-112 of the)	
Public Utilities Act)	
)	(cons.)
Central Illinois Public Service Company)	
Union Electric Company)	
)	00-0395
Petition for approval of revisions to)	
market value tariff, Rider MV)	
)	
Illinois Power Company)	
)	00-0461
Proposed new rider MVI and)	
revisions to rider TC.)	

**JOINT REPLY OF COMMONWEALTH EDISON COMPANY AND ILLINOIS POWER
COMPANY TO RESPONSES OF NEWENERGY MIDWEST, L.L.C. AND CENTRAL
ILLINOIS LIGHT COMPANY TO JOINT MOTION TO STRIKE**

Commonwealth Edison Company (“ComEd”) and Illinois Power Company (“IP”) file this reply to the Response of NewEnergy Midwest, L.L.C. (“NewEnergy”) to the Joint Motion to Strike Filed by Commonwealth Edison Company and Illinois Power Company (“NewEnergy Response”) and the Response to Motion to Strike filed by Central Illinois Light Company (“CILCO”) (“CILCO Response”). For the reasons discussed below, the Joint Motion to Strike (“Motion to Strike”) should be granted.

1. On September 26, 2000, ComEd and IP filed their Motion to Strike. On September 27, 2000, NewEnergy filed a Petition for Leave to File Surrebuttal Testimony

(“Petition”), which set forth in detail NewEnergy’s contentions as to why it felt “compelled” to file surrebuttal testimony in violation of the schedule adopted by the Hearing Examiner. In ComEd’s and IP’s Joint Response in Opposition to Petition for Leave to File Surrebuttal Testimony (“Joint Response to Petition”), ComEd and IP demonstrated that NewEnergy’s Petition was untimely and presented no valid justification for NewEnergy’s failure to adhere to the Hearing Examiner’s schedule.

2. NewEnergy’s Response in large part merely incorporates by reference the arguments NewEnergy made in its Petition for Leave to File Surrebuttal. *See* NewEnergy Response at 2. For that reason, ComEd and IP here also incorporate by reference their arguments in opposition to the Petition, as set forth in their Joint Response to Petition.

3. NewEnergy’s Response does make two new arguments, but both of these arguments are frivolous. First, NewEnergy claims that its Petition renders ComEd’s and IP’s Motion to Strike “moot.” *See* NewEnergy Response at 2. NewEnergy is wrong. The mere filing of the Petition did not by itself render ComEd’s and IP’s Motion to Strike moot, because the Hearing Examiner has not yet acted on the Petition. Only if Hearing Examiner *grants* NewEnergy’s Petition would ComEd’s and IP’s Motion to Strike be moot.

4. Second, NewEnergy appears to contend that ComEd’s service of a discovery request relating to NewEnergy’s surrebuttal is a concession that the testimony was properly filed. *See* NewEnergy’s Response at 3. This contention, too, is incorrect. Given the fact that NewEnergy, without warning, filed unauthorized surrebuttal testimony a few days before the hearing, and the Hearing Examiner will not likely rule before the hearing itself as to whether the unauthorized testimony will be admitted, ComEd had no choice but to serve

protective discovery for use *in the event* the testimony is admitted. By serving such discovery, however, ComEd did not “concede” that the testimony was properly filed or should be admitted. To the contrary, ComEd and IP stand by their Motion to Strike, and ComEd will promptly return any data it receives in response to the data requests if and when the testimony is stricken.

5. CILCO’s Response fares no better. CILCO argues that its testimony “is intended to show that Illinois Power’s past conduct may not have been consistent with its current statement.” CILCO Response at 2. However, the “past conduct” of which CILCO complains occurred two months before the *first* round of testimony in June. If CILCO believed that this conduct was relevant, CILCO should have addressed it in its direct testimony filed on August 29, 2000 or in rebuttal testimony which it could have filed on September 22, 2000. And to whatever extent CILCO now believes that it needs to impeach IP by referring to its past conduct or otherwise test the assertions in the testimony so to “complete the record,” it is afforded the opportunity to cross-examine IP’s witnesses. CILCO and NewEnergy should not be granted the right to file surrebuttal testimony when the schedule—and the adversarial process itself—affords them an opportunity to complete the record.¹

WHEREFORE, ComEd and IP respectfully request that the Hearing Examiner grant ComEd’s and IP’s motion to strike the surrebuttal testimony filed on behalf of NewEnergy and CILCO.

¹ CILCO’s citation to a trial handbook for lawyers is irrelevant here. Rules that govern trial in court are different than those that apply before the ICC.

Respectfully Submitted,

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One of the Attorneys for
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Dated: September 29, 2000

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NOTICE OF FILING

TO: SERVICE LIST

PLEASE TAKE NOTICE that on this date we have electronically filed with the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62706 a Joint Reply of Commonwealth Edison Company and Illinois Power Company to Responses of NewEnergy Midwest, L.L.C. and Central Illinois Light Company to Joint Motion to Strike in the above captioned matter.

DATED this 29th day of September, 2000.

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CERTIFICATE OF SERVICE

I, Courtney A. Rosen, an attorney, certify that I caused copies of the attached Joint Reply of Commonwealth Edison Company and Illinois Power Company to Responses of NewEnergy Midwest, L.L.C. and Central Illinois Light Company to Joint Motion to Strike to be served on each of the interested parties by email, this 29th day of September, 2000.

Courtney A. Rosen